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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.D., a Person Coming Under the
Juvenile Court Law.

B212787
(Los Angeles County
Super. Ct. No. TJ17184)

THE PEOPLE,

Plaintiff and Respondent,

v.

K.D.,

Defendant and Appellant.

APPEAL from an order of the Superior Court for the County of Los Angeles.

R. J. Totten, Referee. Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

SUMMARY

K.D. admitted an allegation in a Welfare and Institutions Code section 602 petition charging him with vandalism of religious property, a felony, but denied an allegation that he committed the offense for the benefit of a criminal street gang. The juvenile court found the gang enhancement allegation to be true, and K.D. appealed from that order. His court-appointed counsel filed a brief requesting this court's independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436. Our review of the record shows no arguable issues, and we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 6, 2008, the District Attorney filed a petition alleging that K.D., then 15 years old, came within the provisions of Welfare and Institutions Code section 602, in that he committed the crime of vandalism of religious property, a felony (count one). (Pen. Code, § 594.3, subd. (a).) The petition also alleged four felony counts of vandalism over \$400, alleging the minor defaced a wall with graffiti (counts two through five). (Pen. Code, § 594, subd. (a)(1).) In connection with each count, it was alleged that K.D. committed the offense for the benefit of a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).)

K.D. admitted the allegations of count 1 of the petition, but denied the gang enhancement allegation. (Counts two through five were dismissed, with K.D. agreeing to pay restitution to the victims in those counts.)

A hearing on the gang enhancement was held on December 11, 2008. The only witness was Enrique Vaca, a police officer assigned to the Wilshire gang enforcement detail. Officer Vaca testified to his background, training and experience with respect to street gangs, and stated he had been assigned to track the Mara Salvatrucha (or M.S.) gang for over a year. Vaca said he had had hundreds of contacts with M.S. gang members, both consensual and non-consensual. He explained the origins of the gang, which started in the early 1980s, and said there were a thousand documented members, with common identifying signs and symbols, including graffiti. Gang members either

spell out “Mara Salvatrucha” or write “the MSX3, which stands for 13, or MS13 or any combination thereof.” The M.S. gang’s territory is “[t]he east end of Wilshire division, some of Korean Town, and the Pico Union area.” The M.S. gang has 15 to 20 cliques, and the area near San Marino Avenue and Menlo Avenue (where the vandalism occurred) is within the M.S. territory, and specifically is within the territory of the Francis Locos clique of M.S., which has about 250 documented members.¹ Vaca has had over a hundred contacts with members of the Francis Locos clique. He conducted hundreds of investigations in their territory, including crimes in which Francis Locos clique members were suspects, and was involved in a task force investigation pertaining to M.S.

Vaca testified that the primary activities of the M.S. gang were vandalism, narcotic sales, grand theft auto (or driving the vehicle without the owner’s consent), and assault, as well as robberies, thefts, murders, and assaults with deadly weapons. Vaca testified to predicate crimes committed by admitted M.S. gang members Jaime Garcia and Carlos Vela,² and the prosecuting attorney presented certified copies of minute orders showing Garcia’s conviction on two robbery counts (Pen. Code, § 211) on January

¹ K.D.’s counsel asserted a standing objection “to any testimony about Mara Salvatrucha,” on the ground that Vaca’s information was obtained from sources she did not have an opportunity to cross-examine, and on the grounds of hearsay and lack of foundation. This and most other objections to Vaca’s testimony were overruled.

² The gang enhancement statute imposes additional punishment for felonies committed for the benefit of a criminal street gang, and defines a criminal street gang to include any ongoing group of three or more persons “having as one of its primary activities the commission of one or more of the criminal acts enumerated” in the statute, having a common name or identifying sign or symbol, “and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (Pen. Code, § 186.22, subds. (b)(1) & (f).) A pattern of criminal gang activity is defined to include conviction of two or more of the offenses enumerated in the statute (which include robbery and unlawful homicide), committed on separate occasions within a specified time period by two or more persons (Pen. Code, § 186.22, subd. (e)), referred to in the cases as “predicate” offenses.

29, 2007, and Vela's conviction for murder (Pen. Code § 187, subd. (a)) on February 3, 2006.³

Vaca testified he was the arresting officer in K.D.'s case. He arrived at the scene after another officer had detained K.D. and his brother J.D. for the vandalism. He took custody of the boys, spoke to the other officer, and wrote the police report. At the police station, Vaca asked K.D. to demonstrate the M.S. sign, and took photographs of K.D. doing so; Vaca testified that the photographs showed K.D. throwing up the M.S. gang sign with his right hand and the Francis Locos clique sign with his left hand. (Defense counsel objected to Vaca's testimony about the photographs, stating "foundation, *Miranda*.")

Vaca testified that he had had prior contacts with K.D., during which K.D. (who used the moniker "Little Leggy") admitted to Vaca that he was an M.S. member. K.D. also admitted he was a member of the Francis Locos clique. (Defense counsel objected to this testimony on the ground of "foundation regarding the circumstances of those contacts.")

Vaca testified that photographs were taken of the vandalism committed, and identified one photograph of the graffiti "MOTA 13" as showing "a common symbol for the Mara Salvatrucha gang." According to the arrest report, both K.D. and his brother were seen doing the graffiti, and K.D. was seen doing the one showing "MOTA 13."

Vaca opined that the vandalism committed by K.D. was done in association with, at the direction of, or for the benefit of a criminal street gang. Vaca testified that the vandalism described was "the form that the gang used to intimidate the community," "letting them know it's a gang in charge of that area." Further, "[i]t's also a way for them to display to rival gang members that this gang is established in the area . . . , and they are

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Defense counsel made a continuing objection to Vaca's testimony concerning the predicate crimes, which she stated was "a foundational objection, a *Crawford* objection, a due process under the federal and state constitution, objection," and also objected to the testimony as unreliable hearsay to the extent information was obtained during custodial contact.

the ones that control it. It's also a way for gang members within their own gang to tell their status by demonstrating that they're willing to put in work for the gang." (Defense counsel objected "regarding the foundation of that opinion.")

On cross-examination, defense counsel elicited testimony about the predicate offenses of Jaime Garcia and Carlos Vela. Vaca testified that the Garcia robbery was not within gang territory and did not involve yelling gang slogans or throwing gang signs; Garcia was a part of the Ados Locos clique of the M.S. gang; and the basis for Vaca's opinion that the Garcia crime was gang-related was the fact that Garcia was an admitted M.S. gang member. The police report in the Garcia case did not mention the Mara Salvatrucha gang. Vaca stated that Carlos Vela was a member of the Normandie Locos clique. Vaca could not specify what percentages each of the various crimes committed by the Francis Locos clique contributed to the gang's overall criminal activity. Defense counsel also asked Vaca if he "Mirandize[d]" K.D. before asking him about his gang affiliation, and Vaca said he did not.⁴

Defense counsel objected to the admission in evidence of the photographs of K.D. throwing gang signs. She also objected to the admission of the Garcia robbery evidence as a predicate crime, in light of testimony from Vaca that Garcia was a member of a clique different from K.D.'s clique; that the M.S. gang was a group of loose-knit cliques within the gang, each operating individually; and that while narcotics activity was very coordinated within the M.S. gang, "other types of criminal activity . . . happen[] more independently within each clique" Counsel asserted there had been no testimony

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Counsel also sought to ask questions she said were related to the circumstances surrounding the photographs taken of K.D. throwing gang signs, but the court stated that it "didn't see it as incriminating. [K.D.] was asked to show what the symbols were and I don't derive from that that he's a gang member. It shows he has knowledge of a gang. I don't confer anything from it. He did it voluntarily, other than he was cooperative with law enforcement." The juvenile court later remarked that "I got teenagers who can walk up the street and throw a sign because they've seen it and they think it's cool."

presented that the Garcia crime was gang-related, and “all the People have is a certified docket saying it’s gang related”⁵

The juvenile court admitted in evidence the certified documents showing the predicate crimes, the photographs of K.D. demonstrating the gang signs (although stating that “I’m certainly not inferring anything negative from them”), and the photographs of the vandalism.

Defense counsel then argued that the gang enhancement had not been proven because (a) the predicate crimes involved different cliques, (b) Vaca’s testimony did not show the Garcia robbery was gang-related (aside from Garcia’s being a gang member), (c) Vaca “had no specifics” regarding the criminal activities of the Francis Locos clique, and (d) as to Vaca’s testimony that K.D.’s vandalism benefited the gang because it established the gang turf, “[t]here’s been no evidence to show that that actually happened in this case.”

The juvenile court found the gang enhancement to be true. It declared K.D. a ward of the court under section 602 of the Welfare and Institutions Code; declared the underlying offense to be a felony; calculated the maximum confinement at seven years, four months; ordered K.D. to a mid-term camp-community placement program, observing that six months in camp would be appropriate at this point; set the terms and conditions of probation (including not leaving the camp without permission, performing 130 hours of community service in the camp, and restitution of \$100); and gave K.D. 45 days pre-disposition credit.

K.D. filed an appeal, and we appointed counsel to represent him. K.D.’s appointed counsel filed a brief pursuant to *People v. Wende, supra*, 25 Cal.3d 436, setting forth the facts of the case but raising no specific issues. The clerk of the court directed K.D.’s counsel to send the record and a copy of the appellant’s brief to K.D., and K.D. was notified of his right to submit, by brief or letter, any grounds of appeal, contentions or

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In *People v. Gardeley* (1996) 14 Cal.4th 605, the Supreme Court held that the predicate offenses need not be gang related. (*Id.* at p. 624.)

argument he wished the court to consider, within 30 days of the notice. No brief or letter has been received.

DISCUSSION

We have undertaken a review of the entire record in this case and have found no arguable issues.

The gang enhancement statute (the California Street Terrorism Enforcement and Prevention Act) provides a sentence enhancement for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) There is substantial evidence in the record from which a reasonable trier of fact could find the gang allegation true beyond a reasonable doubt. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 660.)

To support a finding that a gang allegation is true, the evidence must show, in addition to the facts establishing an ongoing criminal street gang and a pattern of criminal gang activity (see footnote 2, *ante*), that “the criminal conduct is felonious and committed not only ‘for the benefit of, at the direction of, or in association with’ a group that meets the specific statutory conditions of a ‘criminal street gang,’ but also with the ‘specific intent to promote, further, or assist in any criminal conduct by gang members.’” (*People v. Gardeley, supra*, 14 Cal.4th at p. 623-624, quoting Pen. Code, § 186.22, subd. (b)(1).) Both necessary elements are supported by the evidence in this case.

The juvenile court was entitled to conclude from the gang expert’s testimony that the vandalism, in the form of gang sign graffiti, would benefit a criminal street gang. (See *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196-1197 [trier of fact may rely on expert testimony about gang culture and habits, including the size of a gang, gang turf or territory, a defendant’s membership in a gang, the primary activities of a specific gang, motivation for a particular crime, whether and how a crime was committed to benefit or promote a gang, and so on].) Here, Vaca opined that gang-sign graffiti is a form of intimidation of the community, is a way for gang members “to display to rival gang members that this gang is established in the area,” and is “also a way for gang members

within their own gang to tell their status by demonstrating that they're willing to put in work for the gang.”

The second element required by the statute – K.D.’s specific intent to benefit the gang (or, in the words of the statute, his intent “to promote, further, or assist in” criminal conduct by gang members) – may reasonably be inferred from the nature of the crime itself. The specific intent element necessary for a gang enhancement does not require evidence of intent to promote criminal conduct other than the charged crime. As *People v. Hill* (2006) 142 Cal.App.4th 770 (*Hill*) held, “the specific intent required by the statute is ‘to promote, further, or assist in *any* criminal conduct by gang members.’” (*Id.* at p. 774, italics added by *Hill* court.) In *Hill*, the defendant’s own criminal threat – the crime for which he was tried – qualified as the gang-related criminal activity, and “[n]o further evidence on this element [specific intent] was necessary.” (*Ibid.*) The same is true here. The vandalism, which K.D. admitted, consisted of graffiti in the form of a common M.S. gang symbol, and was thus itself gang-related criminal activity. In short, the requirement that “[t]he crime itself must have some connection with the activities of a gang” (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199) is clearly met in this case.

The juvenile court also properly calculated the maximum period of K.D.’s confinement as seven years, four months. A felony conviction for violation of Penal Code section 594.3, subdivision (a) carries a maximum term of three years. (Pen. Code, § 18.) The gang enhancement carries an additional, consecutive maximum term of four years. (Pen. Code, § 186.22, subd. (b)(1)(A).) And the juvenile court had previously sustained a Welfare and Institutions Code section 602 petition filed in February 2008 (as to which K.D. had been placed home on probation), alleging K.D. had committed the misdemeanor violation of resisting, obstructing, or delaying a peace officer (Pen. Code 148, subd. (a)(1)), resulting in the addition of four months to K.D.’s maximum period of confinement.⁶

⁶ See Welf. & Inst. Code, § 726, subd. (c) [“[i]f the court elects to aggregate the period of physical confinement on . . . multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602, the ‘maximum term of

We have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259; *People v. Wende, supra*, 25 Cal.3d 436.)

DISPOSITION

The order is affirmed.

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BENDIX, J.^{*}

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

imprisonment' shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code"]; cf. Pen. Code § 1170.1, subd. (a) [subordinate term for each consecutive felony offense consists of one-third of the middle term]; Pen. Code, § 148, subd. (a)(1) [offense of resisting, delaying or obstructing a peace officer is punishable by imprisonment not to exceed one year].

*

Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.